

No. 14,670

IN THE

United States Court of Appeals
For the Ninth Circuit

NORMAN BREELAND,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY
and E. D. MOODY,

Appellees.

APPELLANT'S OPENING BRIEF.

THOMAS C. PERKINS,

801 9th Street, Sacramento, California.

Attorney for Appellant.

FILED

MAY 24 1955

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Jurisdictional statement	1
Statement of the case.....	2
1. Statement of pleadings.....	2
2. Questions presented	3
Statement of facts.....	4
Specification of errors.....	6
Summary of argument.....	7
Argument	8
1. Denial of a motion for summary judgment bars a subsequent motion for summary judgment on the same grounds	8
2. An action for wrongful discharge may be prosecuted in the courts by a discharged employee who has exhausted the administrative remedies prescribed by his collective bargaining employment agreement.....	10
Conclusion	14

Table of Authorities Cited

Cases	Pages
Barker v. Southern Pacific, 214 F. 2d 910 (1954).....	10, 12
Buberl v. Southern Pacific, 94 F. Supp. 11 (N.D. Calif. 1950).....	10, 11, 12
Collard v. Reconstruction Finance Corp., 103 F. Supp. 794	9
Fraser v. Doing, 130 F. 2d 617.....	10
Garden City Chamber of Commerce v. Wagner, 104 F. Supp. 235	9
Jensen v. McCartney, 95 F. Supp. 598.....	13
Kasper v. Brown, 191 F. 2d 734.....	13
Wallace v. Southern Pacific, 106 F. Supp. 742 (N.D. Calif. 1951).....	10, 11, 12
Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co., 181 F. 2d 341.....	14

Rules

Federal Rules of Civil Procedure, (28 U.S.C.A.), Rule 56..	1, 13
--	-------

Codes

28 U.S.C.A., Section 1291.....	2
28 U.S.C.A., Section 1441.....	2

No. 14,670

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NORMAN BREELAND,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY
and E. D. MOODY,

Appellees.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a summary judgment entered against appellant in the District Court of the United States for the Northern District of California, said judgment having been entered upon motion by appellees pursuant to Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. (T.R. 35, 36.)

Appellant instituted the action by complaint filed in the Superior Court of the State of California in and for the City and County of San Francisco. (T.R. 18.) On Petition for Removal from State Court to Federal Court by appellees under the provisions of

28 U.S.C.A., Sec. 1441, the action was removed to the District Court. (T.R. 3.)

Appeal to this Court is prosecuted pursuant to the provisions of 28 U.S.C.A., Sec. 1291.

STATEMENT OF THE CASE.

1. Statement of Pleadings.

Appellant's suit, filed December 22, 1953, is for damages for breach of contract. The complaint alleges that appellant was employed as a brakeman by appellee Southern Pacific Company, his employment being pursuant to a collective bargaining agreement between Southern Pacific Company and the Brotherhood of Railroad [Trainmen; that appellant was discharged from his employment wrongfully and without just cause and in violation of the said agreement. Damages for this breach are claimed for loss of wages and seniority, pension and hospital benefits.

On January 11, 1954, prior to answering, appellee filed a Motion for Summary Judgment based on the papers, files and pleadings in the action and an affidavit of Mr. E. H. Eyler, alleged to be employed by appellee Southern Pacific Company as a Special Assistant engaged in handling labor relations for appellee. (T.R. 17.) Incorporated in the affidavit as exhibits are copies of letters exchanged between appellee Southern Pacific Company and the Brotherhood of Railroad Trainmen, the labor representative of appellant, negotiating for the reinstatement of appellant

after his discharge. (T.R. 22-29.) On March 1, 1954, Honorable Michael J. Roche, United States District Judge, made an Order denying Motion for Summary Judgment. (T.R. 29, 30.)

On March 11, 1954, appellees filed their answer (T.R. 30-34), alleging as a separate defense that appellant had failed to submit or process his grievance within a one year period as required by Article 58 of the collective bargaining agreement in force during appellant's employment and appellant's cause of action was thereby barred. (T.R. 34.) This issue was the basis of appellees' Motion for Summary Judgment made prior to answering.

On December 29, 1954, Appellees filed a second Motion for Summary Judgment, based on the identical affidavit and exhibits relied on in the Motion for Summary Judgment filed January 11, 1954, and on the identical grounds of the first motion. Judgment in favor of appellees on this second motion was granted by the Honorable Louis E. Goodman, United States District Judge, on January 14, 1955. There was no testimony taken at any point in the proceedings and the record herein consists solely of the pleadings, comprising the complaint, answer, two motions for summary judgment with affidavits in support thereof.

2. Questions Presented.

The question for decision herein is:

Did the trial court err in granting summary judgment to appellees?

The answer to this basic question necessitates findings on the specific questions raised by appellant in this appeal:

1. Is an order of the court denying summary relief a bar to a second motion for summary relief in the same issues?

2. Did appellant exhaust the administrative remedies under the collective bargaining agreement under which he was employed?

3. Did the trial court err in determining appellant's action to be a time claim within the purview of Article 58 of the collective bargaining agreement herein, in the absence of any evidence as to the meaning or accepted interpretation of the term "time claim"?

STATEMENT OF FACTS.

The factual situation must be gleaned from the allegations of the pleadings as no evidence was taken other than an affidavit submitted by appellees.

Appellant's complaint, filed December 22, 1953, alleges employment as a brakeman for appellee Southern Pacific Company under the terms of a written collective bargaining agreement between appellee and the Brotherhood of Railroad Trainmen, by the terms of which appellant was not to be discharged except for just cause and after a fair and impartial investigation. That on November 30, 1949, appellant was unjustly accused of intoxication while on duty. On September 5, 1950, appellant was discharged wrongfully and without just cause. (T.R. 10-11.)

Appellees' affidavit, together with exhibits in support of Motion for Summary Judgment, discloses appellant was notified of dismissal for violation of Rule "G" by letter of B. W. Mitchell, Superintendent, San Joaquin Division, dated December 2, 1949. (T.R. 23.) Thereafter certain correspondence was exchanged between appellant and his representatives of the Brotherhood of Railroad Trainmen and appellee Southern Pacific Company, the subject of the correspondence and conferences therein referred to being the reinstatement of appellant to his employment with appellee company. (T.R. 26-29.)

Article 58 of the collective bargaining agreement sets forth the procedural steps to be followed by a dismissed or disciplined employee of appellee company. (T.R. 20.) Article 58, Section (c), Item (6), provides as follows:

"Decision by the highest officer designated by the carrier to handle claims shall be final and binding unless within one year from the date of said officer's decision such claim is disposed of . . . or proceedings for final disposition of the claim are instituted by the employee or his duly authorized representative . . . is interpreted to mean that the decision by the highest officer designated by the carrier to handle *time claims* shall be final and binding unless within one (1) year from the date of said officer's decision . . . proceedings for final disposition are instituted. . . ." (Emphasis added.)

As disclosed by the letter exhibits herein (T.R. 22-29) appellant's representatives were following the

procedural steps prescribed by Article 58 for reinstatement of appellant. On August 11, 1950, appellant's case was discussed in conference as provided by Item 5 of Article 58. (T.R. 21.) Thereafter, by letter of September 5, 1950, Mr. H. R. Hughes, Assistant General Manager of appellee Southern Pacific Company, designated as the highest officer to handle disputes under Article 58, denied appellant's request for reinstatement. (T.R. 21.)

SPECIFICATION OF ERRORS.

Appellant makes the following specification of error as points upon which he intends to rely on appeal herein:

1. The trial court erred in granting appellees' Motion for Summary Judgment on January 13, 1955, in that the trial court's previous order of March 3, 1954, denying Appellees' Motion for Summary Judgment was a bar to subsequent motion on the same grounds with the same factual situation.

2. The trial court erred in granting Appellees' Motion for Summary Judgment in that the trial court erroneously interpreted the collective bargaining agreement at issue herein.

The trial court interpreted a particular provision of the agreement as setting up a one-year limitation on filing court actions for wrongful discharge. No evidence was taken on this factual issue.

SUMMARY OF ARGUMENT.

1. Denial of a motion for summary judgment bars a subsequent motion for summary judgment on the same grounds.

It is herein contended by appellant that the legal doctrine of *res judicata* applies to motions for summary relief and that the denial of a motion for summary judgment amounts to a legal determination of the issues adjudicated by said motion. A subsequent motion to re-determine these same issues cannot be sustained.

2. An action for wrongful discharge may be prosecuted in the courts by a discharged employee who has exhausted the administrative remedies prescribed by his collective bargaining employment agreement.

Appellant's contentions hereunder are that he has complied with all the contractual provisions of his collective bargaining agreement for reinstatement to his former employment. Thus he had alternative remedies of applying for relief to the Railroad Adjustment Board pursuant to the Railroad Labor Act to seek reinstatement or suing for damages for wrongful discharge in the courts. Having exhausted the administrative remedies he has brought himself within the terms of the collective bargaining agreement and may sue for breach thereof, the breach being his wrongful discharge.

The limitation of one year for commencing proceedings for final disposition of a claim provided by Article 58(c), Item (6), relied on by appellees as a bar to appellant's claim, is confined to *time* claims

and has no application to an action for breach of contract for wrongful discharge.

[The trial court erred in interpreting this provision of Article 58 as applying to appellant's cause of action in that there was no evidence before the court as to the meaning or accepted interpretation of the term "time claims."

ARGUMENT.

1. DENIAL OF A MOTION FOR SUMMARY JUDGMENT BARS A SUBSEQUENT MOTION FOR SUMMARY JUDGMENT ON THE SAME GROUNDS.

As the pleadings disclose, appellees initially moved for summary judgment prior to answering. Through a supporting affidavit they contended appellant was barred from prosecuting his cause of action by an alleged failure to exhaust the administrative remedies prescribed by the collective bargaining agreement, and more particularly, by an alleged failure to bring suit within the time limitations of Article 58 of said agreement. This motion was denied by the trial court (T.R. 29) and appellees answered, raising defensively the same objections made by the previous motion for summary judgment. After answering, appellees made a second motion for summary judgment, based on the same affidavit and on the same grounds as the original motion. (T.R. 35.)

The allegations of the answer injected no new factual material into the controversy which had not been covered in the original motion for summary

judgment. It cannot, therefore, revive the issue as to the justiciable nature of appellant's claim. *Garden City Chamber of Commerce v. Wagner*, 104 Fed. Supp. 235. The trial court's ruling on the initial motion for summary judgment had already determined the sufficiency of the complaint and the right to prosecute his cause of action.

In *Garden City Chamber of Commerce v. Wagner*, supra, the defendant's initial motion for summary judgment made prior to answering was denied. After answering, defendant made a second motion for summary judgment, contending there was no genuine issue as to any material fact. The court denied the second motion, holding that the previous decision sustaining the sufficiency of the complaint and the meritorious nature of plaintiff's claim had become a final determination of the particular issue and it could not be urged a second time.

In *Collard v. Reconstruction Finance Corp.*, 103 F.Supp. 794, the decision of the district court in denying a motion to dismiss was controlling on a subsequent motion by defendant for summary judgment as to the reasons considered by the court in ruling on the former motion and again urged in support of the motion for summary judgment, despite the technical difference between the motions for dismissal and for summary judgment.

There is authority that a second motion for summary judgment based on different grounds than a prior motion which was denied is proper, or if the order denying the motion in the original proceedings

was made without prejudice to defendant's rights to renew. *Fraser v. Doing*, 130 F. 2d 617.

In the case at bar, the second motion was made on the same grounds as the original motion. The order on the original motion was not made without prejudice to appellees' rights to renew the motion. The order in the original proceedings for summary judgment had determined the sufficiency of appellant's complaint and the justiciable nature of appellant's cause of action and was therefore a bar to the subsequent motion.

2. AN ACTION FOR WRONGFUL DISCHARGE MAY BE PROSECUTED IN THE COURTS BY A DISCHARGED EMPLOYEE WHO HAS EXHAUSTED THE ADMINISTRATIVE REMEDIES PRESCRIBED BY HIS COLLECTIVE BARGAINING EMPLOYMENT AGREEMENT.

The trial court, in granting appellees' motion for summary judgment, relied on three cases: *Barker v. Southern Pacific*, 214 F. 2d 918 (1954); *Wallace v. Southern Pacific*, 106 F. Supp. 742 (N.D. Calif. 1951); and *Buberl v. Southern Pacific*, 94 F. Supp. 11 (N.D. Calif. 1950).

The *Wallace* and *Buberl* cases were decided prior to appellees' initial motion for summary judgment. The *Barker* case was decided in the intervening period between appellees' first and second motions. The trial court held that the law relating to appellant's action had been changed by the *Barker* case. A review of the rulings in all the cases appears to refute this.

In *Buberl v. Southern Pacific*, supra, plaintiff sued to recover damages for loss of earnings due to defendant's alleged failure to reinstate him as an employee, the suit being based on a contract between defendant and the Brotherhood of Railroad Trainmen. The court granted summary judgment to defendant on two grounds:

1. A jury award in a prior tort action for personal injuries between the same parties compensated plaintiff for any loss of earnings.

2. The collective bargaining agreement governing plaintiff's employed required employees dissatisfied with their Superintendent's decision to appeal to the General Manager, which plaintiff failed to do.

In *Wallace v. Southern Pacific*, supra, plaintiff sought damages for wrongful discharge, claiming breach of the collective bargaining agreement covering plaintiff's employment. The agreement provided that certain administrative steps for reinstatement be taken by a discharged or disciplined employee, including the presentation in writing to defendant of a grievance within sixty days of dismissal. Plaintiff failed to so present his grievance.

[The court ruled in favor of defendant Southern Pacific on three grounds:

1. plaintiff's discharge had been proper;
2. plaintiff had been compensated by a prior personal injury settlement between the same parties;
3. plaintiff failed to pursue the administrative remedies provided by the contract of employment.

In *Barker v. Southern Pacific*, supra, suit was filed for damages for wrongful discharge, plaintiff being employed by defendant under a collective bargaining agreement requiring a dismissed employee to file a written notice for a hearing within ten days of dismissal or the cause of action was deemed abandoned. Plaintiff failed to file such notice.

The court granted summary judgment to defendant, ruling that filing a request for a hearing was a condition precedent to either further grievance proceedings under the contract or resort to courts of law.

The holding in the *Barker* case is directly in line with those of the prior *Buberl* and *Wallace* cases, that administrative remedies must be exhausted prior to recourse to the courts.

Appellant concedes this to be the law. Appellant contends, however, that he exhausted the administrative remedies required by his contract. He appealed to the Superintendent within the time limitation and from that decision to the General Manager, the highest officer designated to handle claims. There are no further administrative steps to be taken by appellant under the agreement. On September 5, 1950, appellant was notified by the General Manager that he would not be reinstated to his position. At that point, appellant had one of two courses of action open to him; he could present his case before the National Railroad Adjustment Board pursuant to the provisions of 45 U.S.C.A. 151 et seq. or sue on his statutory cause of action for wrongful discharge. Obviously he could

not be expected to repeat the administrative steps a second time.

Article 58 (c), Item (6), relied on by appellees as barring appellant's action, provides that decision by the highest officer designated by the carrier to handle *time* claims shall be final and binding unless proceedings for final disposition of the claim are commenced within one year. Appellant admittedly did not file suit within one year from September 5, 1950, the date of the letter refusing reinstatement from the Assistant General Manager. The meaning of "time claims" and Item (6) of Article 58 (c) thereupon became a material issue of fact. No evidence was taken. The interpretation set forth by Mr. Eyler in appellees' affidavit (T.R. 22) was admittedly inadmissible and only admissible evidence may be considered in summary judgment proceedings pursuant to Rule 56 (c) F.R.C.P. No findings of fact or conclusions of law were made by the district court in granting appellees' motion.

Material issues of fact may not be tried and determined on motions for summary judgment (*Kasper v. Baron*, 191 F. 2d 734) and if there is any genuine issue as to any material fact, summary judgment must be denied. Rule 56 (c), F.R.C.P., *Jensen v. McCartney*, 95 F. Supp. 598.

Where the facts and circumstances, although in no material dispute as to their actuality, reveal aspects from which inconsistent hypotheses might reasonably be drawn, the court errs in granting summary judg-

ment without making any express findings of fact and conclusions of law. *Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co.*, 181 F. 2d 341.

It is respectfully urged that a genuine issue of fact exists herein as to whether or not appellant's action is within the limitation period set forth in Article 58 (c), Item (6) of the collective bargaining agreement. In the absence of express findings of fact and conclusions of law by the district court, it cannot be determined how and in what manner appellant's action comes within these restrictive provisions.

CONCLUSION.

It is respectfully submitted that the summary judgment herein should be reversed for the reasons hereinabove set forth and the cause remanded to be set for trial on the merits.

Dated, Sacramento, California,
May 6, 1955.

THOMAS C. PERKINS,
Attorney for Appellant.